Tan Tock Lay v Chan Tin Soon

HIGH COURT (SINGAPORE) — SUIT NO 157 OF 1989
GOH JOON SENG J
23 MAY 1991

Moneylenders — Financial arrangement entered into by parties — Payment of larger sum claimed to be interest — Bare allegations of previous transactions — Presumption of moneylending — Conditional leave to defend — Moneylenders Act (Cap 188, 1985 Ed), s 3

The plaintiff claimed a total of $1,007,858.38 comprising various sums advanced by the plaintiff to the defendant in order to enable the defendant to carry out his contract with the Housing and Development Board. The plaintiff applied for summary judgment whereby the defendant was granted unconditional leave to defend in respect of $470,000 comprising $300,000 which was alleged to be advanced to the defendant and $170,000 being the agreed consideration for financing made by the plaintiff. In respect of the balance of the moneys the defendant was granted conditional leave to defend subject to a provision of a banker's guarantee. The defendant appealed against the part of the order granting conditional leave to defend and the plaintiff filed an appeal against the whole of the order.

When the appeal of the defendant came up for hearing, it was withdrawn and the plaintiff's claim in respect of the sum of $537,858.38 was referred to the registrar for taking of accounts and it was ordered that the defendant pay the plaintiff the sums (if any) found by the registrar to be due.

In respect of the plaintiff's cross-appeal, the only issue was for the claim of the balance $470,000. The defendant's receipt of $300,000 and his agreement to pay $170,000 were contained in the financing agreement executed by both parties. Under the financing agreement, the plaintiff had to make an advance of $300,000 to the defendant and, inter alia, to open various letters of credit required by the defendant for payment of materials and equipment. In return, the defendant was to be reimbursed for all payments made plus the agreed consideration of $170,000.

Held, granting conditional leave to defend to the defendant: The plaintiff had contended that the $170,000 was interest and the defendant denied receiving the advance of $300,000 although he had acknowledged receipt in the financing agreement. Although there was no evidence provided by the defendant that the financing agreement is an illegal moneylending transaction except for bare allegations, the claim for $170,000 attracts the application of the presumption of s 3 of the Moneylenders Act (Cap 188, 1985 Ed) ('the Act'). In view of the presumption arising in s 3 of the Act, the defendant was granted conditional leave to defend on the condition that the defendant furnishes a banker's guarantee for the said amount within 30 days with costs reserved.

Case referred to

1 *Chow Yoong Hong* v *Choong Fah Rubber Manufactory* [1961] 3 All ER 1163 (folld)

Legislation referred to

Moneylenders Act (Cap 188, 1985 Ed) s 3

Chong Soo Chuan for the plaintiff.
WT Woon for the defendant.

Cur Adv Vult

Goh Joon Seng J: The plaintiff's claim as appears in the statement of claim filed herein is for the sum of 1,007,858.38 comprising three amounts as follows: (i) $710,673.76; (ii) $170,000; (iii) $127,184.62.

The said sum of $710,673.76 is the balance of the plaintiff's claim for an advance to the defendant, and money paid by the plaintiff to finance the defendant in the purchase of materials and equipment required by the defendant and the payment of wages for the execution of the defendant's contract with the Housing and Development Board ('HDB') for Batch 5 works to replace existing mild steel water tanks with fibre glass polyester water tanks. The financing arrangement is evidenced by an agreement ('the financing agreement') dated 31 July 1987. The $710,673.76 is arrived at as follows:

(a)	amount advanced to the defendant	$ 300,000
(b)	add amount expended by the plaintiff for purchase of materials and equipment and payment of wages	$2,933,649.96
(c)	minus repayment received from the defendant	$2,522,976.20
	Total	$ 710,673.76

The said sum of $170,000 referred to is for agreed consideration payable to the plaintiff under cl 1 of the financing agreement for financing the Batch 5 works.

The said sum of $127,184.62 is the balance of the amount paid by the plaintiff at the request of the defendant for the purchase of materials required by the defendant for his works under Batch 9 of the HDB works plus a financing charge of 3% less a sum of $30,000 paid by the defendant to account.

The writ endorsed with the statement of claim was filed on 24 January 1989. The application by the plaintiff for summary judgment under O 14 of the Rules of the Supreme Court 1970 in summons-in-chambers entered No 2608 of 1989 was filed on 4 May 1989. It came up for hearing before the learned assistant registrar on 22 November 1989. The learned assistant registrar granted the defendant conditional leave to defend as to the amount of $537,858.38 subject to a banker's guarantee to be furnished within 30 days therefrom. The defendant was given unconditional leave to defend as to the balance of $470,000. Thereupon the defendant filed his notice of appeal on 24 November 1989 against that part of the order granting him conditional leave to defend on the amount of $537,858.38. The plaintiff on 28 November 1989 filed his notice of appeal against the whole of the order of the assistant registrar.

When the appeals came up for hearing before Sinnathuray J on 9 January 1990, the defendant's appeal

was withdrawn and the plaintiff's claim in respect of the sum of $537,858.38 was referred to the registrar for taking of accounts. By consent it was ordered, inter alia, that 'the defendant do pay to the plaintiff the sums (if any) found by the registrar to be due to the plaintiff on the taking of the said account'. The defendant thereby abandoned his defence all along that the financing arrangement was an illegal moneylending transaction.

When the plaintiff's cross-appeal came up for hearing before me, the only issue remaining was on the balance of the plaintiff's claim for $470,000 in respect of which the defendant had been given unconditional leave to defend. The sum of $470,000 is made up of the sum of $300,000 claimed by the plaintiff to have been advanced to the defendant and the balance of $170,000 which is the agreed consideration payable to the plaintiff for financing the defendant's works in respect of Batch 5 of his contract with the HDB.

The defendant's receipt of the advance of $300,000 and his agreement to pay the agreed consideration of $170,000 are contained in the financing agreement duly signed by both parties. The financing agreement was kept in a safe deposit box in the joint names of both the plaintiff and the defendant with the Geylang Branch of the United Malayan Banking Corporation Ltd ('the bank') and could only be retrieved by both of them being present at the bank. The plaintiff therefore requested the defendant to go with him to the bank to retrieve the same for stamping. The defendant refused. Hence, the financing agreement could not be taken out of the bank's deposit box for stamping and for copies of the same duly stamped to be made for production in the O 14 proceedings. At the time of the hearing before the assistant registrar, the plaintiff had in his possession only an unsigned copy of the draft of the financing agreement. The draft headed 'draft for approval' is annexed to the plaintiff's affidavit of 24 January 1989 as exh 'TTL2'. The said draft was before the assistant registrar hearing the O 14 application. The defendant, however, objected to its admissibility on the ground that the financing agreement had not been stamped and even suggested that he might not have signed it. As the financing agreement was not before him, the assistant registrar gave unconditional leave to defend as to this sum of $470,000.

Pending the appeal, the plaintiff applied in summons-in-chambers entered No 74 of 1990 for and obtained an order compelling the defendant to deliver up to the plaintiff the original of the financing agreement kept in the said safe deposit box for production inspection and stamping if necessary and copies thereof to be made. Pursuant to this order, the financing agreement was taken out of the safe deposit box and duly stamped. A copy of the same was then produced in these proceedings as exh 'CSC-1' to the affidavit of Chong Soo Chuan of 5 February 1991.

When the hearing of the appeal began before me, counsel for the defendant confirmed that he did not wish to rely on the defence of illegal moneylending on the $300,000 claimed by the plaintiff to have been advanced to the defendant and that his client would pay the said sum or part thereof if the plaintiff could prove the payment.

Counsel for the plaintiff then referred to the financing agreement exhibited as 'CSC-1' and relied upon the same as proof of payment. Clause 1(a) of the financing agreement reads:

> In consideration of the sum of $170,000 to be paid in the manner hereinafter appearing Kheng Lock shall:
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> (a) make a cash advance to the contractor of $300,000 *the receipt of which the contractor hereby acknowledges.* (Emphasis is mine.)

Counsel for the defendant thereupon denied having agreed not to rely on the defence that the loan of $300,000, if indeed the loan had been released, was a moneylending transaction by the plaintiff who is an unlicensed moneylender. Eventually, he admitted having so agreed but would like to 'retract my earlier concession that I will not take the point of illegal moneylending on the $300,000'.

Under the financing agreement as evidenced by the agreement of 31 July 1987, the plaintiff was to make an advance of $300,000, thereafter to open letters of credit for payment for imports of materials and equipment required by the defendant and to pay for materials and equipment required or purchased locally by the defendant. The plaintiff was also to pay all other 'expenses including but not limited to wages already paid and incurred or to be paid and incurred' by the defendant for the Batch 5 works. In return, the plaintiff was to be reimbursed all payments made by him plus the agreed consideration of $170,000. For this purpose, it was agreed that upon receipt of payments from the HDB for the Batch 5 works, 90% of each payment would be paid over to the plaintiff and the remaining 10% to be paid into a joint account to be opened by the plaintiff and the defendant.

Pursuant to the financing agreement, the plaintiff claims to have made payment of $3,233,649.96 for the Batch 5 works, inclusive of the $300,000 advanced to the defendant. But the plaintiff has only received reimbursement amounting to $2,522,976.20. The defendant, however, contends that he paid $2,597,617.75.

In his affidavit of 20 June 1989, the defendant stated at para 5.1: 'I paid the plaintiff the sum of $2,597,617.75 and out of the money I received from

Batch 5 work, I utilized the same to pay for Batch 9 work, Batch 4 work and others'. This is a blatant admission by the defendant that he did not abide by the terms of the financing agreement.

On the defence that the financing agreement is an illegal moneylending transaction, other than bare allegations of previous transactions, the defendant has not adduced any evidence showing at least some degree of system and continuity in moneylending transactions by the plaintiff.

> It is a question of fact in each case whether a person is carrying on the business of moneylending. In order to establish that he is carrying on such a business it is not sufficient to prove that he has occasionally lent money at a remunerative rate of interest; it is necessary to prove some degree of system and continuity in his moneylending transaction ... 32 *Halsbury's Laws of England* (4th Ed) para 129.

But although there is no such evidence, the claim for $170,000 as agreed consideration attracts the application of the presumption of moneylending arising under s 3 of the Moneylenders Act (Cap 188, 1985 Ed) ('the Act') which reads:

> ... any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary is proved to be a moneylender.

The effect of s 3 of the then Federation of Malaya Moneylenders Ordinance 1951 which is in pari materia with s 3 of our Act was construed by the Privy Council in *Chow Yoong Hong* v *Choong Fah Rubber Manufactory*,[1] per Lord Devlin at p 1168:

> Section 3 provides that 'any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender'.
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> The effect of this section has been considered by Thomson J in *Sadhu Singh* v *Sellathurai* [1955] MLJ 117 in a judgment which their Lordships respectfully approve and adopt. To lend money is not the same thing as to carry on the business of moneylending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions. If he were left to discharge this burden without the aid of any presumption, a defendant might frequently be in a difficulty. He might have had only one or two transactions with the moneylender and he might find it difficult to obtain evidence about the business done by the moneylender with other parties. Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence, that there were sufficient other transactions of a similar sort to amount to a carrying on of business ...
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> It appears to their Lordships that if a defendant gives evidence that the plaintiff lent a sum of money at interest that may be prima facie evidence — such as to make it necessary or desirable for the plaintiff to call evidence in answer to it — but it does not put any legal burden on to the plaintiff unless the evidence is accepted. If, at the end of the day, after hearing all the evidence on both sides, the judge does not accept it, that is to say, if he refuses to find that the plaintiff lent a sum of money at interest, then there is no presumption under s 3 that the plaintiff is a moneylender; for the simple reason that the defendant has failed to establish that fact which he must establish if he relies on s 3, namely, that the plaintiff lent a sum of money in consideration of a larger sum being repaid. But if at the end of the day the judge holds that that fact has been established, that is, that the plaintiff did lend a sum of money at interest, then there is a compelling presumption that the plaintiff is a moneylender and the judge must hold him to be so unless on the rest of the evidence in the case the plaintiff has established that he is not a moneylender.

In the matter before me, the plaintiff has no doubt expended large sums of money to finance the defendant in the execution of the works under Batch 5 of the defendant's contract with the HDB. The plaintiff claims to have paid out the total of $3,233,649.96 and has acknowledged repayment amounting to $2,522,976.20. The defendant claims to have repaid $2,597,617.75. By the financing agreement, the plaintiff provided the capital required by the defendant to carry out his contractual obligations with the HDB. However, in this financing arrangement, the plaintiff is to be paid a financing charge of $170,000. This, the plaintiff contends, is interest. The defendant thus relies on the presumption under s 3 of the Act, although he abandoned the defence of illegal moneylending in respect of the plaintiff's claim for $537,858.38 before Sinnathuray J. The defendant also denies having received the advance of $300,000 though he has acknowledged receipt of the same in the financing agreement.

However, in view of the presumption arising under s 3 of the Act, I give conditional leave to the defendant to defend in respect of the plaintiff's claim for $470,000 on condition that the defendant furnishes a banker's guarantee for the said amount within 30 days with costs reserved.

Order accordingly.

Solicitors: *Chor Pee & Co, WT Woon & Co.*

Reported by *Yap Shao Sin*